Application No. 1823

SUPREME COURT OF GEORGIA

81 6174

ATLANTA, November 5, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RAYMOND FRANKLIN V. WALTER ZANT, SUPT

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RAYMOND FRANKLIN,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5025
	:	
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Bibb County. Petitioner was convicted of Murder and Kidnapping. He was sentenced to death for Murder and to twenty years imprisonment for Kidnapping. His convictions and sentences were affirmed by the Supreme Court. Franklin v. State, 245 Ga. 141 (1980). The Supreme Court of the United States denied certiorari.

The Petition contains 37 numbered paragraphs, 24 of which substantive claims for relief (11-34). Evidence and argument have been presented on 13 points, however, and the Court will only address these claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition. All unsupported allegations will be deemed abandoned and without merit.

The record in this habeas case consists of the transcript of the proceedings before this Court on May 26, 1981, and the transcript and record of Petitioner's trial in the Bibb County Superior Court.

II.

In paragraph 11, Petitioner claims he was denied effective assistance of counsel in violation of his constitutional rights.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Barry Staples. (H.T. 50,78). Mr. Staples was admitted to the Bar in 1974 and has since engaged in general practice in Marietta, Georgia. (H.T. 49). Counsel estimated that 30-40% of his practice was in the criminal area. (H.T. 79). He had handled a number of major felony cases, including armed robbery and kidnapping cases. (H.T. 49-50). He had also served as co-counsel in a prior capital felony case. (H.T. 49). Counsel received some assistance in this case from his law partner, a law clerk, and a private investigator. (H.T. 51).

Counsel filed numerous motions. (R. 6-8, 13-19, 21-29, 40-44, 47-59). He met with Petitioner on several occasions (H.T. 23,70) and with Petitioner's family several times. (H.T. 13, 22-23). Counsel visited the crime scenes, viewed evidence at the

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District Attorney's office, and visited the State Crime Lab where he examined evidence. (H.T. 52). He interviewed or at least obtained statements from all witnesses who testified at the trial. (H.T. 56). He also had a private psychiatrist examine Petitioner, but did not present this evidence at trial because the report was not favorable to Petitioner. (H.T. 56-57).

Counsel's stragegy was to show the fatal shooting was an accident. (H.T. 59). He did not want Petitioner to be subjected to cross-examination in the guilt/innocence phase, so Counsel determined the best way to get in the evidence favorable to Petitioner was through cross-examination. Id. Petitioner's version of the incident was contained in his statement which was read to the jury. (T.T. 459).

Counsel asked Petitioner and his mother for the names of possible witnesses for the sentencing phase. (H.T. 13, 26). Petitioner's mother gave Counsel a list of ten or twelve names and indicated that seven would be willing to testify. (H.T. 13, 21-22). Counsel did not call Mr. McGee or Ms. Lingerfelt, who were present at the trial, or Mrs. White, who had been subpeonaed for a subsequent day, because he thought their testimony would hurt as much as help. (H.T. 22). Sheriff Lee of Douglas County told Counsel he would not present evidence favorable to Petitioner. (H.T. 31, 57). Of the two deputies from Douglas County, one became ill and could not

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attend the trial while the other came but told Counsel he knew nothing of the events. (H.T. 19, 58).

At trial Counsel made an opening statement (T.T. 272-274); cross-examined the State's witnesses (T.T. 287, 293; 302; 319; 348; 360; 370; 378; 387; 394; 398; 402; 408; 413; 416; 423; 426; 438; 471; 480; 508; 510; 520; 531; 691; 697); gave argument during guilt/ innocence phase of the trial (T.T. 550-555); gave argument during sentencing phase (T.T. 684-685; 817-821); presented three expert witnesses during the sentencing hearing who testified before the judge who then excluded their testimony from the jury (T.T. 713; 728; 736) in addition to presenting Petitioner's mother (T.T. 749), Petitioner (T.T. 759), and the tape of Petitioner's statement (T.T 762).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Such decisions as whether to have put Petitioner on the stand or which other witnesses to have called are among the strategies and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1978). Effectiveness is not measured by how another lawyer may have handled the case. Estes v. Perkins, 225 Ga. 268 (1968); Jones v. State, 243 Ga. 820 (1979).

Accordingly, the claim for relief in paragraph 11 is found to be without merit.

12., 13., 14.

In paragraphs 12, 13, and 14, Petitioner challenges the death penalty as it is provided for, imposed, and reviewed under Georgia law. Specifically, he contends his death sentence inflicts a punishment which is cruel and unusual in light of all relevant facts relating to the offense and offender. He also alleges his death is being exacted pursuant to a pattern of Georgia authorities to discriminate on grounds of race, sex, and poverty. Finally, he attacks the statutory provisions governing appellate review of death sentences.

Georgia's death statute has been declared constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Accordingly, these allegations are found to be without merit.

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19.

In paragraph 19, Petitioner claims constitutional violation from the trial court's failure to charge the jury on the law and existence of mitigating circumstances during the sentencing phase.

FINDINGS OF FACT

The relevant portions of the jury instruction are as follows:

> "Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."
>
> (T.T. 842).
>
> "Now, the defendant in this case contends that mitigating circumstances exist. The mitigating circumstances which the defendant contends exist in this case, among others, are Raymond Franklin's age; whether Raymond Franklin cooperated with the police; whether Raymond Franklin has never before been convicted of a capital felony and what Raymond Franklin's emotional state was at the time of the offense, and also, members of the Jury, you may consider as mitigating circumstances any other fact or circumstance which you, as members of the Jury, find to be mitigating.
>
> Now, members of the Jury, in reaching your decision on the question of punishment, you weigh any aggravating circumstances that you find against any mitigating circumstances that you find and in that way, you determine what the sentence should be in this case.
>
> I charge you further, however, that even if you find no mitigating circumstances in the case, you are authorized to return a verdict of life imprisonment."
>
> (T.T. 845).

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CONCLUSIONS OF LAW

There is no requirement that mitigating circumstances are to be singled out by the trial court in instructing the jury. Potts v. State, 241 Ga. 67, 68 (1978); Spivey v. State, 241 Ga. 477(2)(1978). Neither is there a requirement that the jury be instructed that mitigating circumstances are to be weighed against aggravating circumstances. Gates v. State, 244 Ga. 587(6)(1979). Yet, the trial court did what it was not required to do and gave examples and explained the relationship between mitigating and aggravating circumstances. Far from harming Petitioner, the jury instruction could only have served to benefit him.

Mitigating circumstances were defined. The jury was instructed they were free to recommend life even if they found aggravating circumstances to exist. The jury was properly instructed as to what it as to consider in reaching its decision as to sentence. Spivey v. State, 241 Ga. 477 (1978); Gates v. State, supra.

Accordingly, the claim for relief in paragraph 19 is found to be without merit.

20., 21.

In paragraphs 20 and 21, Petitioner alleges his constitutional rights were violated by jury selection procedures which allegedly excluded all persons having conscientious or religious scruples against capital punishment and resulted in a jury not representing a cross section of the community.

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FINDINGS OF FACT

During voir dire, one prosepctive juror, Della Mae Vickers, indicated she was opposed to capital punishment. (T.T. 151- 153). She stated that she would never, under any circumstances, consider the death penalty as an alternative. Id. She was challenged for cause, and the Court sustained the challenge and excused her. Id.

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), jurors may be excused for cause because of their views on capital punishment where they would automatically vote against the death penalty without regard to evidence which would be developed at the trial. Juror Vickers clearly meets the test and was properly excluded.

The Supreme Court in Witherspoon v. Illinois, supra, also rejected Petitioner's argument that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury.

Accordingly, the allegations in paragraphs 20 and 21 are found to be without merit.

23.

In paragraph 23, Petitioner claims he was denied effective assistance of counsel by the system of appointment of counsel for indigent persons in capital cases in Georgia.

In that Petitioner presented no evidence on this

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issue, the Court finds the allegation to be without merit.

25.

In paragraph 25, Petitioner contends that the jury charge on intent was impermissibly burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1978).

This issue was decided adversely to Petitioner on appeal. Franklin v. State, 245 Ga. 152(8).

Accordingly, the allegation in paragraph 25 is found to be without merit.

26., 27.

In paragraphs 26 and 27, Petitioner claims he was indicted by an unconstitutionally composed grand jury and convicted by an unconstitutionally composed traverse jury. He claims certain groups were unconstitutionally excluded from the jury pools.

FINDINGS OF FACT

Petitioner moved for and was granted a change of venue from Cobb to Bibb County. Franklin v. State, 245 Ga. at 143. Counsel filed challenges to the Cobb Grand Jury and Bibb Petit Jury on grounds other than exclusion, but the challenges were overruled. Franklin v. State, 245 Ga. at 143(1).

Counsel testified that he had been furnished statistical information on the jury selection process in both counties. (H.T. 65, 85). He determined the grounds raised were his best method

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of challenge. (H.T. 54, 66).

Thomas Charron, District Attorney of the Cobb Judicial Circuit, testified that a successful grand and petit jury challenge occurred in Cobb County in 1976. (H.T. 82, 84). This resulted in a revision of the jury selection process in Cobb County. (H.T. 84).

CONCLUSIONS OF LAW

The right to object to the composition of the grand or traverse jury in a habeas corpus proceeding under Georgia law will be deemed waived unless the Petitioner shows that cause exists for his being allowed to pursue the objection after the conviction and sentence and conviction have become final. Ga. Code Ann. §50-127(1). Under Federal law, an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

In light of the fact that both juries were challenged at Petitioner's trial, Petitioner's remaining objections on other grounds are deemed waived.

Even if the Court did not conclude that waiver has occurred, Petitioner has not demonstrated either cause or prejudice exists in this case.

The "cause" asserted by Petitioner in this case is that his trial counsel rendered ineffective assistance of counsel by failing to challenge the juries on the grounds of the exclusion of certain groups. Failure to challenge arrays of grand and

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traverse juries alone is not a ground of ineffective assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193 (1978); Birt v. Hopper, 245 Ga. 221 (1980). Furthermore, the decision to challenge on the grounds counsel did raise is a strategic decision which is the exclusive province of the lawyer after consultation with his client. Reid v. State, supra.

Petitioner has shown no actual prejudice because the Court has before it no evidence indicating that a jury challenge would have been successful.

This claim for relief is therefore without merit.

28.

In paragraph 28, Petitioner contends that the death penalty is in fact administered arbitrarily and capriciously in violation of his Eighth and Fourteenth Amendment rights.

Petitioner has presented no proof on the issue. Accordingly, the allegation is found to be without merit.

33.

In paragraph 33, Petitioner claims the evidence was insufficient to convict him of the offense of murder beyond a reasonable doubt and results in a viblation of his constitutional rights.

Claims as to the sufficiency of evidence may not be raised in a state habeas corpus proceeding. Littles v. Balkcom, 245 Ga. 285 (1980).

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WHEREFORE, all allegations in the Petition having been found without merit, the Petition is denied.

SO ORDERED, this 10 day of September, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage. --The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record.

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done volunaarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--

The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--

Service of the petition shall be made upon he perso having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

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(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

STATE OF GEORGIA	:	BIBB SUPERIOR COURT (COBB COUNTY CASE)
VS.	:	CASE #2016-79
RAYMOND LEE FRANKLIN	:	CHARGE: KIDNAPPING & MURDER

CHARGE TO THE JURY BY HONORABLE WALKER JOHNSON, JR.

Members of the Jury, the Grand Jury of Cobb County has returned an indictment charging Raymond Lee Franklin with the offenses of kidnapping and murder, in separate counts. To this indictment the defendant stood mute and the Court has directed that a not guilty plea be entered. The plea, on the one hand, and the indictment, on the other hand, form the issue which you as Jurors have been impaneled to try. These counts are being tried together, but I charge you that you are to consider each count against this defendant separately and you are to determine the guilt or innocence of the defendant on each of these counts without being controlled in that determination by your findings as to the guilt or innocence of the defendant in the other count. In other words, you try each of these counts against the defendant just as you would try it, if the defendant were on trial on one count and you were to determine the guilt or innocence of the defendant in each of these counts without being controlled by your determination of guilt or innocence on the other count.

Now, I'm not going to read the indictment to you. The indictment will be out with you subject to your inspection and it has been read to you. You should look at the indictment and read it for the specific charges brought against this defendant.

Now, the charge I am about to give you will apply unless otherwise specified to each count of this indictment separately and you will consider the same in connection with each count of the indictment.

The fact that the defendant has been indicted by the Grand Jury raises no presumption or inference whatsoever against him. You will not take the fact that an indictment has been preferred against the defendant as having any probative or evidentiary force or value whatsoever. The indictment is only the process which the law has adopted to bring a defendant to trial, containing as it does, the contentions of the State. All of these contentions in this case are denied by the defendant. The defendant's plea of not guilty which has been entered on his behalf challenges and denies every material allegation in each count of this indictment and I charge you that before the State is entitled to a verdict of conviction of this defendant at your hands upon either count of this indictment, the burden is upon the State of proving the defendant's guilt as chargedin such count beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.

Now, reasonable doubt is just what that terms implies. It's a doubt based on reason. It is not an arbitrary nor a capricious doubt but it is just such a doubt as a reasonable man or woman would have, would act upon, or would decline to act upon in a matter of importance or grave concern to himself or herself. In other words, a reasonable doubt is the doubt of a fair-minded, impartial juror actively seeking for the truth and it may arise from a consideration of the evidence, from a conflict in the evidence or from a lack of evidence. If, upon a consideration of all the facts and circumstances of this case, your mind is wave ing, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the defendant the benefit of that doubt and acquit him. If, on the other hand, no such doubt rests upon your mind, it would be equally your duty to return a verdict of guilty.

Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption, while not evidence, is yet in the nature of evidence and it remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.

Now, you are the judges of the <u>law</u> in the case but you take the law as given you in charge by the Court and applying the law to the facts as you find the facts to be, you return a verdict that speaks the truth of the case. That is the object of all legal investigations; the discovery of the truth.

You are the sole and exclusive judges of the facts in the case. You pass upon the weight, the force and the credit to be given to the evidence in the case and you alone determine the credibility of the witnesses who have testified in the case. In passing upon the credibility of the witnesses, you are authorized to consider all the facts and circumstances in the case, the witnesses' manner on the stand, their means and opportunity for knowing the facts about which they testified, their interest or want of interest in the case, their intelligence or lack of intelligence, the nature of the matters to which they testified, the probability or improbability of their testimony, their bias or prejudice, if any, and also, their personal credibility insofar as they may legitimately appear from the trial. You may also consider the witnesses' relation to the case or to the parties in the case. All of these things are proper matters for your consideration insofar as they legitimately appear from the trial. It is for you to finally determine what credit is to be given to any witness.

Now, I charge you as to two types of evidence; direct evidence is that which immediately points to the question at issue. Indirect, or circumstantial, evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. To warrant a conviction on circumstantial evidence alone, the proved facts shall not only be consistent with the hypothesis of guilt but shall exclude every other reasonable hypothesis, save that of the guilt of the accused.

When the guilt of a defendant depends on circumstantial evidence alone, the rule is that each separate fact or issue linked in the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proven beyond a reasonable doubt. A fact or circumstance not so clearly proven, shall not be considered by the Jury as part of the chain of circumstances but should be rejected by them. The circumstances so proven must be a part of a complete, unbroken chain and must not only be consistent with the defendant's guilt, but must exclude every other reasonable hypothesis, save that of the guilt of the accused.

If one or more of the circumstances relied on by the State are not so clearly proven and for that reason you reject one ormore of the circumstances so relied upon, then you would require whether the remaining circumstances you believe are so clearly proven are consistent with the defendant's guilt, and inconsistent with any other reasonable hypothesis, save that of his guilt.

I charge you, however, that whether dependent upon direct or circumstantial evidence, the true test in a criminal case is not whether the conclusions at which the evidence points may be false, but whether or not the evidence is sufficiently strong to satisfy your minds and consciences to a reasonable and moral certainty and beyond a reasonable doubt of the defendant's guilt. If the evidence is thus strong, it would be your duty to convict. If it is not thus strong, it would be equally your duty to acquit.

Now, members of the Jury, you have heard some testimony concerning a statement that may or may not have been made by this defendant. I charge you that all statements shall be scanned with care and confessions of guilt shall be received with great caution. A confession alone uncorroborated by any other evidence shall not justify a conviction.

Members of the Jury, I charge you that flight, if any, by one who has done an act alleged to be a crime, immediately after the act and similar acts, if proved, from which an inference of a consciousness of guilt may be drawn by the Jury, may be considered by the Jury, but flight is subject to explanation. The weight to be given to it, and whether or not the Jury will draw the inference of a consciousness of guilt from it is a question for the Jury. It is for the Jury to determine whether the flight of the defendant, if any such has been shown, was due to a sense of guilt or was prompted by other causes and if the alleged flight was prompted by causes other than a consciousness of guilt, no inference hurtful to the defendant should be drawn from the alleged flight.

Now, members of the Jury, the Court does not mean or intend by anything heretofore said or hereafter said to express or intimate to you any opinion as to what has or has not been proved in this case or as to what your verdict should or should not be. If the Court has said or done anything or should say or do anything during the progress of this trial, including this charge, which would lead you to believe that the Court has expressed or intimated any opinion as to what has or has not been

proved or as to what your verdict should or should not be, then you will disregard that entirely and completely disabuse your minds of that.

Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.

Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.

A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, members of the Jury, in Count I of this indictment, the State charges that on or about the 17th day of January,

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of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow or inflicts the fatal wound, that is sufficient.

Members of the Jury, I charge you that it is not encumbent upon the accused to prove an absence of malice, if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice, if the evidence for the State shows facts which may excuse or justify the homicide. But it is for you, the members of the Jury to say after a consideration of all the facts and circumstances in the case, whether or not malice, express or implied, exists in the case.

Now, members of the Jury, I charge you that if you believe beyond a reasonable doubt that Raymond Lee Franklin, in Cobb County, at any time prior to the return of this indictment, with a weapon or instrumentality named in the indictment, and with malice aforethought, either express or implied, did unlawfully and intentionally shoot and kill the deceased, Claude Collie, as charged in the indictment, and you believe the weapon or instrumentality used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder and in that event, the form of your verdict would be, "As to Count II, we, the Jury, find the defendant guilty."

Now, as to each count of this indictment, the defendant contends that he is not guilty of the offense charged and further contends that the State has not proved his guilt of the offenses as charged in each count to a reasonable and moral certainty and beyond a reasonable doubt, and he further contends as to Count II, the murder, that the homicide was an accident.

I charge you that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention of criminal negligence. An accident, in the eyes of the criminal law, is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design.

Members of the Jury, if, from a consideration of the evidence or from a lack of evidence, you are not satisfied beyond

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a reasonable doubt and to a reasonable and moral certainty that the State has established the guilt of the defendant of the offense charged in Count I or Count II, or both, of this indictment, then it would be your duty to acquit him as to such count and the form of that verdict would be, "As to Count I, we find the defendant not guilty." "As to Count II, we find the defendant not guilty."

Now members of the Jury, you decide this case on the facts of this case as you find them to be and as applied by you to the law in this case as given you in charge by the Court and you reach a verdict speaking the truth of the case. You are not concerned with the effect of your verdict, but you are concerned that it speaks the truth in the case. You will consider each count in the indictment separately and return a verdict under each count separately in one of the forms which the Court has given you in charge.

Members of the Jury, your verdict as to each count must be unanimous, in writing, dated and signed by your Foreman in this case. If you cannot unanimously agree on a verdict, the Court is required by law to declare a mistrial and try the case again before another Jury; however, no Juror is required to surrender his or her honest opinion because of an honest, different opinion of another Juror, or other Jurors, or for the purpose of reaching a unanimous verdict. Jurors should consult with one another and deliberate with a view of reaching a unanimous verdict, consistent with their consciences and oaths as Jurors. Each Juror must make an individual decision, but only after a fair

and impartial consideration of the entire case with their fellow Jurors. A Juror should not hesitate to re-examine his or her views or change his or her opinion, if after fair and impartial discussion and deliberations with the other Jurors, the Juror is honestly convinced that he or she should change his or her opinion. Every effort consistent with the instructions I have just given you and with your consciences and oaths as Jurors should be fairly and honestly made to reach a unanimous verdict in this case. Whatever your verdict is is a matter entirely for you, Ladies and Gentlemen, to determine.

Now, I'm going to ask the Bailiffs to take the Jury, minus the thirteenth Juror, up to the Jury room but I am instructing you not to begin deliberations until I send the evidence to you and advise you to begin your deliberations.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 8:45 P.M.)

BY THE COURT: Mr. Staples, do you have any exceptions to the Charge?

BY MR. STAPLES: No, sir, Your Honor, with the exception of the requests which you failed to charge.

BY THE COURT: Any exceptions for the State?

BY MR. CHARRON: No, Your Honor.

(WHEREUPON, JURY BEGAN THEIR DELIBERATIONS AT 9:03 P.M. AND RETURNED TO THE COURTROOM AT 10:15 P.M. AND THE FOLLOWING TRANSPIRED:)

BY THE COURT: Who is your Foreman or Forelady?

BY FOREMAN GERECHT: I am, sir.

BY THE COURT: All right, the question is that you want a re-definition of malice and malice aforethought, is that right? (SEE T.821-(a) COURT'S EXHIBIT #A)

BY FOREMAN GERECHT: Yes, sir, and also we'd like a definition of what they legally term accidental.

ADDITIONAL CHARGE TO THE JURY BY THE COURT

I charge you on accident. The law of Georgia is that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. An accident is an event that takes place without one's foresight or expectations; that which takes place or begins to exist without design.

Malice aforethought is an essential ingredient of murder. Malice may either be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Malice, as I said, is an essential ingredient in murder as charged in this indictment and it must exist before the homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred. It is the unlawful,

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deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow, or inflicts the fatal wound, that is sufficient.

Now, that's the definitions. Anything else?

BY FOREMAN GERECHT: That's all.

BY THE COURT: You may go back to the Jury room and resume your deliberations.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 10:20 P.M. FOR FURTHER DELIBERATIONS.)

BY THE COURT: Is there anything else?

BY MR. STAPLES: No, sir.

BY MR. CHARRON: No, Your Honor.

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT 10:30 P.M. AND THE FOLLOWING TRANSPIRED:)

BY THE COURT: Mr. Foreman, has the Jury reached a verdict?

BY FOREMAN GERECHT: Yes, sir, we have.

BY THE COURT: All right, would you hand it to the Bailiff, please. Mr. Charron, would you please publish the verdict. The defendant will please rise.

BY MR. CHARRON: Your Honor, in case #790126 out of Cobb Superior Court, the State of Georgia vs. Raymond Lee

(WHEREUPON, THE JURY LEFT THE COURTROOM AND THE FOLLOWING TRANSPIRED:)

BY MR. STAPLES: Your Honor, I anticipate that the State will attempt to introduce this morning in aggravation, two pleas of guilty previously entered by Mr. Franklin. Notice was formally served upon me of their intent to do so, I believe, the 23rd day of April, 1979, which was the first day of this trial. The Georgia Court of Appeals in the case of Queen v. The State, has stated, that notice given the day of the trial is not sufficient under the law. I believe it's cited in 131 Ga. App. 370. I call to the Court's attention p. 373. In that case, the Court said as follows: "Defendant contends error in the manner in which the state complied with the requirement of Code Ann. Sec.27-2534 whereby the state is required to make known to the defendant evidence that it plans to use during the sentencing phase in 'aggravation.' There was a three-day hiatus between the plea of not guilty and the commencement of the trial. The requisite notice of the existence of a previous indictment and conviction that had occurred in 1969 was not given until the day the trial began. Defense counsel objected to the introduction of the certified copy on the ground that the notification was not timely. The objection was overruled. The document introduced was an indictment in two counts, one being for larceny of an automobile and the other for receiving stolen goods. The indictment further showed the defendant was found not guilty as to the larceny charge but was found guilty on the

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the receipt of stolen goods offense with the sentence being set at three years with the recommendation of misdemeanor punishment. When the legislature created in 1970 our bifurcated procedure separating the sentencing phase from the trial portion dealing with guilt or innocence, the statute which is now codified as Sec. 27-2534 provided for the admissibility of additional evidence 'in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible.' No time was specified as long as it was prior to trial. Whenever the courts undertake to interpret the meaning of a statute, we are required to 'look diligently for the intention of the General Assembly, keeping in view, at all times, the old law, the evil, and the remedy.' Code Sec. 102-102(9). In following this directave, we recognize that the intention of the legislature obviously was to give the convicted defendant enough time to rebut or explain any conviction record. Even though we recognize that an accused would have knowledge of his personal history he should nevertheless be given sufficient opportunity to subpoena witnesses and reasonable time in which to obtain evidence that might be available by subpoena. Obviously the giving of notice on the same day as the commencement of trial is not sufficient

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for this purpose and does not meet the requirement of fair play and sound justice. In consideration of the old law, the evil and the remedy it was clearly the intention of the legislature in creating the bifurcated procedure to give a reasonable period of time in which the convicted person might develop extenuating evidence to meet the previous record. Accordingly, this case is remanded for retrial limited to the sole issue of punishment." Now, Your Honor, on April 20th, 1979, I received a letter delivered by hand by Mr. Charron's secretary from Ms. Staley which states: "While we were talking I forgot to tell you that we will be using prior convictions against Raymond Franklin in the sentencing phases. These are a plea of guilty in 1974 in Fulton County for criminal attempt to commit robbery, case #A-24286, and a plea of guilty in Douglas County for burglary in July 1977, case #CR-77-849. We will serve you with formal notice Monday morning. Also, I found an extra witness yesterday afternoon. His name is E. L. Morris and he is a Douglas County Deputy Sheriff. If I can be of further help let me know. Sincerely, Mary Staley." I call Your Honor's attention to the case of Moss v. The State, a decision of the Georgia Court of Appeals, 144, p.226, a case from Cobb County Superior Court before Judge Ravan in which Mr. Charron, the District Attorney represented the State with the assistance of Adele Grubbs. In that case, "Prior convictions of the appellant were tendered into evidence at the sentencing phase of the trial. Objection was made to one of them

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because the state's intention to submit that conviction was not disclosed prior to trial. Code Section 27-2503. The court admitted the record into evidence and sentenced appellant to 20 years. Appellant contends that the sentence must be set aside. The state argues that the purpose of the statute requiring disclosure prior to trial has been served because there were almost three weeks between the guilt and sentence phases of the trial." Citing Queen v. The State, which I have just cited to Your Honor. That case "is cited for authority that substantial compliance is sufficient, so long as the defendant has time to prepare for the sentence hearing." The Court of Appeals says: "Queen does contain an analysis of the legislature's intent in passing former Code Ann. Sec. 27-2534 (replaced by Sec. 27-2503), but it does not suggest that the statute need not be literally followed. In fact, this court in Queen remanded the case for resentencing." Now, Your Honor, inasmuch as the letter is outstanding, I call your attention to the case of Gates v. The State, 229 Ga. 796. In that case, #4. "During the sentencing phase of the trial the State introduced evidence of two prior convictions of the appellant over the appellant's objection. The objection was that the State had not 'made known' to the appellant prior to his trial that this evidence would be introduced. Our statute provides that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible at the sentencing phase of the trial. Code Ann. Sec. 27-2534. The

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State contended that the appellant's attorney had 'been told' of prior convictions of the appellant prior to the trial but had not specifically informed appellant's counsel that this specific evidence of prior convictions would be relied on by the State and introduced in evidence at the sentencing phase of the trial. Appellant's counsel contended that the State had not put him on notice that the specific evidence offered would be used by the State during the sentencing phase of the trial." The Supreme Court said: "We believe that this statute means that notice of each specific conviction to be introduced in evidence by the State at the sentencing phase of the trial should be given to the party on trial or his attorney. And the fact that such notice was given should be clear and not cloudy, as in this case." Your Honor, I call your attention, as well, to the case of Ramsey v. The State, 241 Ga. 426. In that case, the defendant was served with a notice of an FBI rap sheet. The State contended that such notice as contained in the FBI rap sheet would be sufficient notice to put him on notice that convictions were going to be introduced.

BY THE COURT: I know Ramsey. We don't have the Ramsey case.

BY MR. STAPLES: Your Honor, it is my position with regards to all three of those cases that they must be read in conjunction with one another.

BY THE COURT: Let me see the letter.

BY MR. STAPLES: I would point out to Your Honor such letter was given to me late Friday afternoon, at approximately

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midday, before three o'clock, after lunch. The case in which convictions were extensively, in Douglas County and Fulton County, we were in Cobb County for a trial that was to begin the following Monday. We take the position that such notice was not proper.

BY MR. CHARRON: Your Honor, if it please the Court, Code Section 27-2503 (a) which requires that the State serve notice on the defense of any prior convictions that they intend to present in the presentence phase does not require more than reasonable compliance. Each case that Mr. Staples has already cited to the Court, in each case, it says the same thing. As long as reasonable compliance with the Code Section has been met then the Code Section has been satisfied. In the case at bar, we not only have reasonable compliance, but I cannot even see the issue of where were in any non-compliance with the Code Section. Notice, if you want to call it formal notice, if that in fact the Court is not going to recognize the letter of the 20th, was given prior to the issue being joined on the case on Monday, which the Code Section states is prior to trial. That's all the Code Section ever states, but what probably would be misleading was the fact that actual notice was given on the 20th, which was Friday afternoon. And not only was that notice hand-delivered to Mr. Staples in his office, but in that letter, we specifically gave him the conviction notice of the two prior convictions that we intended to introduce at the trial, at the pre-sentence phase of the trial. Now, the purpose of the

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BY MR. STAPLES: Your Honor, I intend to call at this time, Mr. E. L. Smith, who I would attempt to qualify as a man who is an expert in the death penalty from having worked on death row as an Assistant Chaplain. I expect him to testify as to the ritual of executions. I except him further to testify about life on death row and its affect on the inmates. The purpose of this testimony is to show that the nature of capital punishment is more than execution. I further expect him to testify about the sociopsychological profile of the criminal and to what regard Mr. Franklin fits that profile. I further expect him to testify as to execution statistics in the State of Georgia in view of showing that they are applied primarily to poor, and I expect him to testify to some extent as to the rehabilitative qualities of some persons who have been placed on death row.

BY MR. CHARRON: Your Honor, my objection will be briefly stated. Number one, I think it has no relevancy whatsoever to this phase of the trial or to the defendant as he stands before the Jury to offer mitigating or extenuating circumstances as to the charge of this particular crime. It is not for the Jury to decide philosophical questions of whether or not the death penalty in general is imposed properly or not, but only as it applies to this defendant. They have been qualified already as Jurors as to their general opinion as to the death penalty and that they would apply the facts of this case to the punishment for the defendant. Assuming that this individual could even be qualified as an expert, which

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I gravely doubt, any application of the philosophical view of death penalties or life on death row would have no relevan to this case in point; it would be improper and it would be invading the province of the Jury to hear testimony as to how an execution is conducted or carried out since that is not their concern or in their purview. Now, they are instruct when they give a punishment, that that is meted out by the Courts, that their duty is over at that particular time and they should only weigh the facts and circumstances as they surround this particular case and whether or not that punish ment meets the crime.

BY MR. STAPLES: Your Honor, if I might; I qualified in the voir dire, Jurors as to whether or not they had ever seen an execution and the only Juror in the entire panel that had was Mr. Gerecht. Now, I take the position that this wide scope of evidence used in the sentence is permissible under the rule of Gregg v. Georgia, U. S. Supreme Court case 428 U.S. 153, 49 L. Ed. 2d 859 at 891. In that case, the Court said: "We think that the Georgia Court has wisely chosen not to impose unnecessary restrictions on the evidence that can be offered as such a hearing and to approve open and far-ranging argument... So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision." And, Your Honor, in addition, Spivey v. State,

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241 Ga. 477, considering mitigating circumstances, the Court held in that case "that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating, without limitation or definition." Spivey cited Jurek v. Texas, in the same vein, "the jury may be asked to consider whatever evidence of mitigating circumstances" which may be brought before them. Now, that covers part of the argument, but the balance of the argument is that this Jury is here to determine whether a sentence of capital punishment should be imposed on this man. It's my contention, Your Honor, that they cannot adequately make that decision until they are informed of what it entails. Capital punishment, Your Honor, is more than execution. It goes beyond that; it goes to living on death row; it goes to the impact, the uncertainty of execution date, the reprieves; it bears on whether or not the sentence should be imposed in this case. Now, it's my understanding that evidence which logically tends to prove or disprove material facts which is at issue in the case and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant, but the weight of the evidence is not to be considered. It need only tend to prove or disprove the material issue. Again, Your Honor, I think in determining whether or not the death penalty is an appropriate punishment for the facts and circumstances of this case, the Jury must first be informed of what it entails. There is precedent for this testimony, Your Honor, in the case of Curfew Davis v. The State of

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Georgia, in which these exact same witnesses testified. I would rely on that case for the proposition of relevancy.

BY THE COURT: Tell me again, you said one witness was going to testify as to the prospects of rehabilitation or something of this defendant? Tell me about that.

BY MR. STAPLES: Yes, sir. It's my understanding that Mr. Smith may statistically be able to show the prospects of rehabilitation for death-row defendants. Then I would attem to have him make a statement based on his experience and knowledge of the prospects of rehabilitation for this defendant.

BY THE COURT: What statistics is he going to be relying on?

BY MR. STAPLES: Statistics gathered by him concerning the application of the death penalty in this State. How many have been executed, who they were, and what has happene to those who have not been.

BY THE COURT: Well, of course, nobody has been execute for a number of years.

BY MR. STAPLES: Well, this is within a time period in which there were active executions, that's what the statisti are.

BY THE COURT: Of what people though? People who were sentenced to death?

BY MR. STAPLES: Yes, sir.

BY THE COURT: And who were or were not executed?

BY MR. STAPLES: Yes, sir.

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BY THE COURT: Go a little bit more in depth with me as to what you're talking about, about rehabilitation, and who he is talking about.

BY MR. STAPLES: It's my understanding that he has experienced with death-row inmates, certainly, who were sentenced to death for one reason or another, that had their sentences commuted; the prospects for their rehabilitation.

BY THE COURT: How is that relevant? It would be relevant perhaps, if he had statistical surveys concerning people who had not been given the death penalty and had been given life imprisonment and what their rehabilitation record was.

BY MR. STAPLES: I'm not sure whether he has that or not, Your Honor.

BY THE COURT: Do you want to find out?

BY MR. STAPLES: Yes.

BY THE COURT: Go ask him.

BY MR. STAPLES: Your Honor, I have discussed that with two of my witnesses. One witness has actually no statistics; one witness has statistics dealing with persons sentenced to death and commuted to life. Both witnesses have actual knowledge of persons given life imprisonment and their rehabilitation.

BY THE COURT: What about --well, tell me again, other than the manner of execution, what happens in between the time or while the person is on death row, tell me other than what we've just talked about, tell me what the other point is you wanted this testimony for.

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BY MR. STAPLES: I think with regards to that first witness, I think that was everything, was capital punishment was more than the death penalty. I was attempting to show that the death penalty was more than an execution.

BY THE COURT: I remember what it was. It had to do -- and tell me if I'm wrong, it had to do with who the death penalty was imposed against?

BY MR. STAPLES: Yes.

BY THE COURT: And those are basically the three points.

BY MR. STAPLES: With regard to that witness.

BY THE COURT: You want to go on and tell me what the other witnesses you propose will testify to?

BY MR. STAPLES: I have another witness who is a professor of theology who will discuss the Biblical authority for the death penalty in its foundation in the Bible; is there any Biblical authority against the death penalty and can those things be reconciled and if so, how. The purpose of that is to show that the foundation upon which our laws were built is Biblical authority, which Biblical authority does not demand the death penalty.

BY THE COURT: Neither does the Georgia statute.

BY MR. STAPLES: I understand, but there may be those on the Jury who do <u>not</u> understand. The purpose of that is to inform them of that.

BY THE COURT: What is your next witness?

BY MR. STAPLES: The next witness is a man from the State of Texas who has similarly witnessed 189 executions

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and will testify as to the ritual, again, what effect it has All of these witnesses as I have told Your Honor, have previously testified as expert witnesses in cases over the State.

BY THE COURT: In a case?

BY MR. STAPLES: Yes, sir, I believe they were called to testify in the Dawsonville case I'm not sure if they testifie

BY MR. CHARRON: First of all, I'd like to know if that was ever objected to, whether there's ever been a case that holds that. The Dawsonville case obviously wouldn't because that case was dismissed against those defendants at some point in time. I don't know the other cases that Barry cited, I'd like to know if there was any objection raised. So, I don't know whether the fact that one Court may have allowed it in without any objection to it would not be relevant. My concern is that I think he's invading --my argumen is he's invading the province of the Jury, their sole discretion and determination, If he wants to argue to the Jury that the death penalty is not supported by Biblical sense, then that's not evidence, that's in his argument to the Jury It would be improper to put a witness on and to classify him as an expert, if in fact that could be done, and I still hav some serious doubts whether in all humility, they could be qualified as experts in those fields and to offer them as witnesses for mitigation, for extenuating factors of this case and this defendant. Now, the old execution statistics do not even apply to the statute of which we are applying

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to this defendant, the old statute, so those statistics would not even apply, would not even be up-to-date and there were no aggravating circumstances which the State had to prove in those times. I seriously doubt their worth as any evidence whatsoever. In a presentence phase, I have never known of any evidence that's been allowed into the testimony, whether it's been before a Judge or before a Jury, that it does not touch upon the defendant. If he wants to bring in a preacher that knows the defendant, that knows how he is, that's fine, that's what it's meant for but to bring in a philosopher to talk about the death penalty or its Biblical sense is improper and I object to it.

BY MR. STAPLES: Your Honor, the case that I was referring to is Davis v. State, 241 Ga. 376. I don't believe there is a statement in that case of whether or not the evidence was objected to. Certainly, it was considered in the post-conviction review, the sentence review. I think the statement of that case as to what they had testified is as follows, on p. 387: "Appellant called several witnesses. A former death row inmate testified that he (the witness) had been rehabilitated, and that 'lifers' are not people who cause trouble in prison. A newspaper reporter testified he had written a book as a death house reporter. He described an electrocution and said most of those he saw executed were blacks. He was familiar with only two cases where parolees who were serving life terms for capital crimes had returned to prison as parole violators and committed heinous crimes.

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A minister who had served a prison ministry testified that in his study of executions in Georgia, only twice from 1930 to 1961 (31 years) was a wealthy man executed. A college religion professor explained his interpretation of the 'eye for an eye and a tooth for a tooth' philosophy of punishment They also had a clinical psychologist who testified. They were cross examined because "On cross examination," it states that when the psychologist "was asked a hypothetical question encompassing the facts of appellant's case, he responded he would conclude his test results were probably wrong." It said: "In reviewing the death penalty" in that case, they considered cases appealed to the Court since January 1970, and they said: "We find similar cases listed in the Appendix support ..."

BY THE COURT: I think one of the cases of the rich man was from my home county who was immortalized in the Coweta County murders book.

BY MR. STAPLES: Your Honor, I would return to the principle set down in Gregg that in this type of hearing where the supreme penalty the State will extract is an issue and there should be no unnecessary restrictions on the evidence and the Court should approve any far-ranging argument as long as it does not prejudice the defendant. The Court again said they thought it was "desirable for the jury to have as much information before it as possible..."

BY THE COURT: The context they are talking in though was where the defendant said that the vice in the statute

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was that it was open and far-ranging and that is why they made that statement. The Charge of the Court which has been approved and which will be given in this case is as follows: Mitigating circumstances are those which do not constitute a justification or an excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing to degree of moral culpability or blame. So, it is not an easy question to answer and I'm going to take a few minutes and try to satisfy myself about this.

(WHEREUPON, COURT WAS RECESSED AND THEREAFTER RE-CONVENED AND THE FOLLOWING TRANSPIRED OUTSIDE THE PRESENCE OF THE JURY:)

BY THE COURT: I will sustain the objection. You may make an offer of proof.

E. L. SMITH, First having been duly sworn, testified under oath as follows:

DIRECT EXAMINATION BY MR. STAPLES:

Q Would you state your name for the Court, please, sir.

A My name is E. L. Smith.

Q Mr. Smith, how long have you been in the State of Georgia?

A All of my life, soon will be fifty-two years.

Q How are you employed?

A I'm an educator in the --

Q You were with the State of Georgia?

A For six years, yes, sir.

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Q Prior to that, how were you employed?

A I was a Baptist pastor for twenty-one years.

Q Would you tell the Court something of your educational background, please, sir.

A Yes, I was--went to Mercer University, finished high school by way of GED and then at Mercer University in Macon in 195[illegible] during which time I served as student pastor in Middle Georgia. Following the completion at Mercer, I served fulltime Baptist churches in South Georgia for the next sixteen years. Following, 1966, I began teaching at the State Prison at Alto, simultaneously went to school at the University of Georgia and between 1966 and 1971, received a Master's Degree with two concentrations; one in vocational rehabilitation counselling and the other in adult and continuing education. Since that time I have studied in the area of correctional education.

Q In your training in vocational rehabilitation training, did you say?

A Yes, sir.

Q Did you take any psychology courses?

A Numbers of courses in psychology.

Q What types of psychological courses did you take?

A Behavior modification, abnormal psychology, other standardized required course.

Q Have you lectured anywhere?

A Yes, in most of the colleges and universities of Georgia and a number outside the State.

Q Have you written any books?

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A Yes, sir, in 1965 I published a small booklet entitled "The Chair."

Q Have you made a study of the death penalties?

A Yes, I did. In late 1959, I became pastor of the Collins Baptist Church in Tattnall County adjacent to Georgia's State Prison. Chaplain Jenkins was an older man who was Chaplain of the prison at that time and unable to climb stairs and so he asked me to help him with the Chaplain's work at the prison. For three years, I assisted Chaplain Jenkins at the State Prison at Reidsville. My primary responsibility was the area of death row, for several reasons. To begin with, Chaplain Jenkins was not able to climb stairs and the elevator didn't always work, so I began to be concerned about the subject and began studying the subject. Between 1960 and 1965 I studied the subject of capital punishment in general and the execution of the death penalty in Georgia in particular and in 1965, as I said, published the sort of a documentary-type of statistics on the death penalty.

Q You have made a sociopsychological study of the death penalty?

A Of individuals on death row and I would not say I limited the sociopsychological study to persons on death row, but to criminality in general.

Q Do you believe that people who commit crimes should be punished?

A Yes, sir.

Q Do you believe that there is something wrong with people who commit murder?

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A I believe there's something wrong with people who commit crimes, whose behavior is abnormal or who have difficulty adapting to regulations of a social order.

Q Expand on that for me, please, sir.

A Well, a number of people have done series of studies in the area of abnormal behavior with the particular emphasis on criminality and numerous individuals have attempted to establish what is called or may be called criminality profile. I could not claim credit for the profile that I envision as a criminality profile solely, but I have a concept of the profile of an individual who commits crime.

Q What is that concept? Would you explain it for me?

A The description of the individual, Number one, he is usually a very dependent individual. If you don't mind, I've made notes here which are available if you would like to see them. This individual is easily influenced by others around about him, by the forces of society, by alcoholism, by various influences in the community, very easily influenced by the forces around about him. He's generally void of the imposition of self-discipline. He's anxiety-prone and he is --and this is perhaps the single factor that is most usually true, in common language, he's a liar. He's a pretender; he fails to tell the truth particularly when he feels it is in his own best interest. He's unable to accept himself. I think this is rather significant. He's unable to accept himself because he expects more of himself than he's able to produce. This is a common term we often refer to in prison; he has a champagne appetite with a beer budget. As a result of these afflictions,

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he's on the surface a totally self-centered individual,and the last segment of this profile, he attempts and likes to blames othe and other forces for his own behavior, failing to take responsibil for his actions.

Q You met Mr. Franklin?

A Yes, I have.

Q Have you read his psychological profile?

A I have read the psychological profile prepared by psychologists at the Jail in Marietta.

Q Does his psychological profile fit that of your crimina psychological profile, sociopsychological profile?

A Some segments, yes. In others, no.

Q Tell me about that, please, sir.

A Well, both from my observation and particularly the results of the psychiatric examination or psychological examination, he has been envisioned as a very dependent individual; he tends to blame forces, parents, drugs, blame other forces for his own behavior. I could not --do not kno if he tells the truth but in several areas --but the problem with a psychological profile in criminality is that you cannot limit it to persons who have been convicted of crimes or who are standing ready to be convicted of a crime. Many of the segments of a psychological profile in criminality would fit me. In fact, I never hesitate when I began to study some of these very factors are elements of my own charact my own behavior, but yes, in answer to your question, Mr. Franklin is apparently a very dependent individual, very insecure, frustrat because of his dependency, angry because of his dependency upon

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drugs and upon other people, angry because he's a follower rather than a leader; yes, sir.

Q Are you familiar with the term "capital punishment"?

A Yes, sir.

Q How are you so familiar?

A Would you repeat that question, sir.

Q How are you familiar with it?

A Well, I have spent a great deal of time on death row, not as a prisoner but as a Chaplain's aide and assistant.

Q Have you observed men on death row?

A Yes, I have.

Q What does the term "capital punishment" encompass?

A Well, it encompasses first and foremost in this country because of the extremeties to which we go in democracy, to explore all of the appellate processes, first and foremost, capital punishment is the spending of a great deal of time awaiting death; awaiting an appointed time for death. It's sitting in a cell, just one wall separated from the chair, the electric chair; it's a man sitting reading, primarily the Bible, reading all kinds of materials; it is the anguish of knowing the sentence that has been passed upon you and the helplessness that you as an individual feel and not being able to affect that decision, knowing of the potential that death is awaiting you sometimes two weeks away, sometimes years away. It's far more than the act of the pulling of the switches and the allowing of the current to pass through your body.

Q Does that have an effect, that waiting have an effect on people on death row?

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A From my observation, it has a drastic effect. On one occasion, a man in Massachusetts, two days after the Governor had commuted his sentence, killed himself in his cell because of the - evidently, because of the mental anguish through which he passed.

BY THE COURT:

Q Could it have been because he didn't want to spend the rest of his life in prison?

A I believe, sir, he was not aware of the fact that his sentence had not been commuted.

BY MR. STAPLES:

Q Have you, from being on death row, observed the facilit for electrocution at Reidsville Prison?

A Yes, sir.

Q Describe those for me, please. Perhaps you could descr it easier with the ritual of execution.

A Right now, Georgia has, I believe, sixty people on deat row. The facilities that are ordinarily referred to as death floo would not accommodate but seven prisoners at one time, there are seven cells on the top floor of the State Prison. I've neve seen two men awaiting the death penalty in the same cell; they were always kept in separate cells, so I'm assuming they still are kept in separate cells. In order to provide for this increased number of people who are awaiting death, I assume that they house them in some other area, but death row as I know it, is the top floor of the prison. Facing the prison, you are looking at the prison from the front, you will see the top floor on the left top, indivi ual's left looking at the prison, an area that encompasses the

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cells. A man is taken from his cell the morning of execution; prior to this a spot is shaved on his head so that the electrodes can be properly attached to his head; an area shaved on each leg between his knee and his ankle so that the electrodes can be placed there, very similar to, if you had an EKG, the same attachments, similar attachment is used; a solution similar to vasoline is placed on the body; the man them is led from his cell down a very short corridor. Prior to being on death row, I'd heard of the last mile and I envisioned it as being an extended corridor but this is not the case at Reidsville. The distance from the cell that is farthest away from the electric chair is not more than from where I'm sitting to the doors at the rear of the Courtroom, down a narrow hallway. The man is led out this narrow corridor and out a door and this door goes out on, I want to say a balcony, but it's not really a balcony, it's an area that there are steel bars overhead. He walks out the door underneath these bars, a wall on either side and he's told, 'You may look up and see the sky for the last time.' He walks up approximately ten steps, making a lefthand turn, after he exists this door, walks approximately ten steps and back again to another door which leads to the area and as he walks in the other door, he faces the electric chair. The electric chair, again, the first time I saw it I was very disappointed because I suspect my most painful experience has been in a dental chair and I envisioned the electric chair to be something like a dental chair with all the attachments around it but it wasn't. I was really disappointed. It was a gross, old wooden chair much like a straight chair, not a rocking chair, sitting on a platform and the only

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mechanics unusual about the electric chair is that it has two backs in it. This is --one back is the standard back of the chair standing straight up, erect, but between the body of the person being electrocuted and the stationary back, there is another back which is fastened on hinges at the bottom. The individual is strapped into this chair with tight belts around his chest, tight straps across his legs and to the bottom of the chair. After these leather straps are pulled as tightly as they possibly can be pulled, a huge, wooden wedge, approximately sixteen inches in length and coming to a sharp point at the end, approximately four inches in diameter at the top; this wedge is placed between the two backs on the chair and a hammer is taken and the wedge is driven down between the two backs so as to force greater pressure on leather straps that go around the man's body. I asked about this and the explanation was given that when the current --of course, when the current hits the man, it hits him with such force that the bones of the body are broken and in order to --after the electrocution has been facilitated in order to move the body, they lay out the body and this helps to keep from breaking the back, so that the corpse will be easy to handle when it's moved from there to the table a few feet away. The electric switches are in behind the electric chair. I had often heard also that there were three switches and neither of the men who pulled the switches knew who actually facilitated the cause of death. This is not the case. There actually are four switches, two switches are thrown by the throwing of handles and then on the wall where the switches are located, two handles are thrown, there are two ropes coming through holes and the same two people who

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pull the switches, pull the ropes so as to increase or decrease the amount of voltage and amperage that go into the body of the individual.

Q How much current is used?

A It varies. I've heard they turn 20,000 volts; it depends on the number of amps. As I understand it, 440 volts with accurate amperage is adequate to bring about death. Death does not always occur on the first throwing of the electricity, however. A deacon at my church at Collins was the doctor who proclaimed the men dead and on numerous occasions, he's had to request additional amperage and voltage.

Q Where do those men stand who are throwing the switches in order the see the doctor?

A I didn't understand your question.

Q Where do the men who are throwing the switches stand in order to see --

A They are behind the electric chair and after the initial switches have been thrown and the amperage and voltage in the electrocutor's opinion adequate to kill the man, he steps backwards and as he steps backwards, he can look to his left and see the doctor and see whether or not the doctor requires additional voltage or amperage.

Q Is your knowledge of electrocution based on firsthand experience?

A Yes, sir.

Q Are you familiar with execution statistics in this State?

A Yes, sir.

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Q What time period?

A From the time period --not until 1930 were uniform statistics kept in this country. Prior to that time, a person could be hung in a county seat town and few reports that occurred in Georgia, reports of it went to Atlanta but there were no uniform statistics kept in Washington. After that time, statistics were kept. So --

Q Is that where you get your statistics?

A --the statistics that I have are based from 1930 through 1961.

Q Where do they come from?

A They came from the Uniform Crime Statistics Reports out of the Department of Justice in Washington.

Q Is that for the State of Georgia?

A All states and with particular emphasis on the State of Georgia.

Q Have you become familiar with those statistics?

A Yes, sir.

Q What do they tell you?

A Number one, they tell us that Georgia led the nation in the execution of persons during that thirty-one-year period, with a total of 361 individuals executed.

Q And that's from 1930 to 1961?

A 1961. If we bring it up to 1964, 366 individuals were executed.

Q And since then?

A And since 1964, no one has been executed in Georgia.

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Q What else do those statistics tell you?

A Of the 361 that I studied most closely, 295 --I can preface that by saying, the statistics very glaringly said one thing; that historically, only the poor are executed. Of the 361 executed in Georgia during that period of time, 295 were black in the State, and of course, blacks were poor at that time --

Q Pardon me, sir?

A I accounted for this as not so --I found it not to be so much a racial problem as an economic problem. In the studies I made, if the black were wealthy, he was not executed. If the black were the "friend" of a prominent white, wealthy white, he was not executed, so money made the difference.

Q Have you made any study or do you have any knowledge of the recidivism rate?

A Recidivism? It's a Baptist word, yes, sir, fallen from grace.

Q People who have been given life sentences.

A What is your question about the people who have been given life sentences?

Q Do you know anything about their rate of fall from grace?

A Well, persons are given --we have to remember that until 1966, Georgia had fourteen offenses considered capital, including burning a railroad bridge, so persons were given life sentences for other crimes other than murder or armed robbery or kidnapping. Warden R. P. Balcolm was Warden at Reidsville State Prison for about twenty years, --

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Q That's the father of the present Warden?

A That's correct, Charles is Warden Balcolm's son. Warde Balcolm --by the way he accepted the job and they imposed the deat penalty, he accepted the job only --and the State law at that time said that the Warden had to witness executions--Warden Balcolm accepted the job only if the State would hire a Warden in charge of executions, so he never witnessed an execution. Warden Balcolm and I have talked on many occasions and his statement to me, one that I remember particularly, is 'that persons who have committed capital offense and have been sent here and not executed are the best prisoners I have.' 'Those who have worked in my house, house-boys, have been murderers, largely speaking, over the years.' I cannot verify this but statistic that I have read someplace say that of the murderer, the most usual type of murderer, only approx: mately two to five per cent repeat their act. Now, this excludes murder for hire.

Q Is there anything else you would like to tell us that would have any bearing on this case?

A On this case? I think it's rather interesting that as I talked to Mr. Franklin yesterday and I've met his mother and father, I mentioned a moment ago that historically in Georgia, blacks have been executed. I also qualified that by saying that historically in Georgia the poor have been executed. Since the early '60's the tables have turned; a black no longer has inferior representation; a black today this young man's age would perhaps have a team of lawyers here but here is a poor white man and the tables have turned in this particular case and perhaps his defense

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falls into something of the same category, that the defense of blacks did over a period of thirty years, Court-appointed attorney without the brigade of lawyers and facilities available.

Q Anything else?

A Not to my knowledge.

BY MR. STAPLES: Your witness.

CROSS-EXAMINATION BY MR. CHARRON:

Q You stated that you made all these observations about death row between the years of 1959 and 1962?

A Yes, sir.

Q Have you been to Reidsville since that time?

A Yes, sir.

Q On death row?

A Yes, sir.

Q When?

A I believe it was 1968 during the time of the Preston Cobb case. I visited and worked in the Preston Cobb case.

Q Since that time have you been?

A No, sir.

Q Your book, "The Chair," that was written in 1965 with facts and figures of what you compiled for the three years you were in Tattnall County and your recollections?

A No, no, they are not compiled on recollections; on statistics, study in the various libraries of the country. I spent five years in the study of it.

Q You compiled it from other statistics across the country?

A Yes, sir.

Q And regurgitated them in your book?

A Yes, sir. I don't like the word "regurgitated," I'd rather --

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Q Well, that's what they are; they're not your statistics you got them from somewhere else.

A A compilation; there's a compilation, right.

Q And the criminality profile, that concept is not your concept either, is it?

A Combination of Dr. Samenow, the book "The Criminal Personality," it's part of his work, yes, sir.

Q You read that book and you adapted your profile to what he has said?

A I don't know whether it's fair to say that I have a profile. I have an idea of a profile based on experience of working with prisoners from State Prison at Alto, young offenders; working with people at Reidsville and people at Buford's Rock Quarry Prison; working with criminals in The Bureau of Prisons.

Q You also stated that you read from the psychiatric examination concerning Raymond Franklin --

A I qualified that to say the psychological profile.

Q Psychological; this is a piece of paper that you read someone else's findings from. You didn't conduct any examination?

A No, I did not, no, sir.

Q And when did you meet Raymond Franklin for the first time?

A Yesterday, sir.

Q Observed him less than twenty-four hours?

A Yes, sir.

Q The Massachusetts killing that you talked about, you read about that, the man that killed himself?

A Yes, sir.

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BY MR. CHARRON: I have nothing further.

DR. ROBERT OTTO, First having been duly sworn, testified under oath as follows:

DIRECT EXAMINATION BY MR. STAPLES:

Q Would you state your name for the record please.

A My name is F. Robert Otto.

Q Is it Dr. Otto?

A Yes.

Q How are you employed, sir?

A I'm on the faculty at Mercer University here in Macon.

Q In what field?

A In the Department of Religion and Christianity.

Q How long have you been in that?

A Twenty-three years.

Q Prior to that?

A Prior to that I was in graduate school.

Q Would you give us the benefit of your educational background, sir.

A I received a Bachelor and Master of Arts Degree from the University of Minnesota; a Bachelor of Divinity from the Bethel Seminary in Minnesota and a Master of Theology and Doctor of Theology from Southern Seminary in Louisville.

Q Have you written any works?

A Just short articles.

Q Have you lectured any?

A I've been lecturing for over twenty-three years now.

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Q Are you a member of any societies?

A Well, the Professional Theological Society and Society for Professors.

Q Have you ever appeared as a witness before in a case?

A Yes.

Q How many times?

A I believe it's three times.

Q Have you made a study of the death penalty?

A Yes, I have.

Q In what context?

A In the context of religious and philosophical theological thought.

Q Do you believe that people who commit crimes should be punished?

A Well, yes, I don't look upon that, the death penalty in that kind of issue. It's not a question of death penalty or nothing. It's a question of validity and appropriateness of the death penalty. Yes, I do believe in punishment, if that's what you're asking.

BY THE COURT:

Q Do you think it appropriateness in general, is that what you're talking about?

A If I understand you, yes.

Q Appropriateness of the death penalty in general?

A Right.

BY MR. STAPLES:

Q Is there any Biblical authority for the death penalty?

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A This --your question now involves a rather subtle and sophisticated analysis of what those who are members of the Judeo-Christian faith acknowledge and accept as their authority and if that authority is seen, you know, as a historical document that in itself has had a history, then one can say that at a certain stage of the history of this Jewish-Christian revelation, there were specific laws that called for a death penalty, yes, but the whole document itself has a history and has a history of the devel ment of that idea.

Q Expand on that for me, please, sir.

A Yes, you can find very unambiguous and exquisite statements in the Old Testament that call for the death penalty on a number of different occasions or for a number of different situations; the death penalty for murder, the death penalty for adulter and incest, death penalty for a child either striking or insulting his parents, death penalty for blasphemy; a number of specific death penalties in the Old Testament. The one that I would assume that is crucial to our consideration is the one that has to do wit taking someone else's life, killing or murder. The most exquisite words and those used most frequently are found in both in the Book of Genesis and the Book of Exodus. In Genesis, in the paraphrase of the words would be, "He who takes man's blood by man shall his blood be shed," which I think is quite clear, and a different kind of statement in Exodus, "An eye for an eye and a tooth for a tooth When one reads that, you know, some twenty-five hundred years afte the writing of those words, it's very easy to misunderstand their import; that is, in the context of when those words were said as

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an expression of the Rhine, revelation of the Hebrew god. That limiting of executions, to say, one person, was already a moral advance. What I mean by that is that prior to this time, if you, for example, had in any way been responsible for the death of a brother or sister of mine, I might in revenge kill seven of your brothers and sisters, so that an 'eye for an eye and a tooth for a tooth,' or 'He who sheds man's blood by man shall his blood be shed,' you see, is already an attempt to show that even the crimin must receive some kind of consideration. So, this is an advance. Now, to take that as an absolute statement for all centuries that unfold after that is to misunderstand the very nature of the sacred scriptures of the Jew and the Christian. One of the, I think, crucial stories is in Genesis, Chapter 4, the interesting story of what is called the first murder, the Cain and Abel story. The murderer in his dialogue with the Jewish god expresses a concern that because of what he's done, his own life is not safe and the interesting key to the insight here is that God puts a mark on him indicating that even the criminal has some consideration for the compassion in the sense of justice on this part of this God. This is already a remuneration, you see, of how you handle a criminal who has murdered. Now, as you move on through the centuries, I have to leave out a good deal but to get to the heart of it, you have what is called the prophetic movement in addition to the development of Hebrew law and in one of the most fascinating prophets, the prophet Hosea, there is the unfolding in dramatic form of a new kind of awareness of the nature of this God and what it implies as to how Jews are to relate to one another and other human

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beings; that is, the prophet's own experience with his wife becomes a sort of a window for him in terms of a continuing dialogue with his God, a further kind of manifestation of who this God is and hence, what He expects. The prophet discovers after some time that his wife is unfaithful to him but he wishes to remain faithful to her essentially because he still loves her and he does everything to re-claim her and change her and nothing works and she goes from bad to worse until finally in desperation, he divorces her. After the divorce, his wife becomes even worse and on one day when he's going to the market place, he discovers that she's on the block for sale and discovers that he still loves her and pays the price to buy her back. Now, the interesting thing is that the prophet uses that as an indication of --this is the nature of our God, that even judgment, and in this instance, judgment, that this was a judgment of his own people, that judgment is always in a context somehow or other of redemption, of love, of rehabilitation, of reclaiming and this becomes a conditioning factor upon a Jewish understanding of how you apply the law, particularly with regard to taking human life. Now, when you get in the New Testament, you don't find any exquisite statements about death penalty as you do in the Old Testament but you find that the center of the faith for the Christian, who is Jesus of Nazareth, that Jesus as a matter of fact, apparently understands and interprets himself in his own vocation in the light of his prophetic movement and what he does, if I could put it as briefly as I can, is to take the genius or the spirit or the thrust of Hebrew law, let's say, and then intensifies it, and I'm thinking for example of two things, one a sermo

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on his part and the other an episode. Perhaps the most famous episode is his encounter with the woman caught on adultery who is charged with this and then faces execution by stoning because this is what Hebrew law required, and Jesus puts himself quite clearly in opposition to the law at this point in the way he handl the case. Now, that is verbalized more exquisitely in what is known as The Sermon on the Mount in which he introduces the contrast which again is very subtle and has to be read very carefully He introduces a contrast between himself, say, and the Hebrew law of the past. He puts it in this way: "You have heard it said of old but I say unto you." Now, the interesting thing is, he does not entail that there is a fundamental contradiction between the past, or Hebrew law, in what he does; what he's really trying to say is that 'I'm catching the spirit or the thrust and I'm intensifying it. You've heard it said of old an eye for an eye and a tooth for a tooth, but I say unto you forgive and love,' and what he's really saying, as far as I can see and it's not just myself, at this point, he's catching the original thrust or spirit of 'an eye for an eye, a tooth for a tooth,' some consideration for the ones who are responsible for a particular crime, and he's saying, in effect, that when it comes to human life, there is a kind of ultimacy here, an ultimacy that finally is a prerogative of God and although there is punishment, punishment is always couched finally and ultimately within the terms of what is also concern and love for the criminal and I suppose this is finally acted out in his own death. You know, for me, the atonement is not just a beautiful idea or a theological-created something; I think it's

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finally a demonstration of the life of The Incarnate One; that no man or woman ever falls so low that he's beyond the reach of love, of redemption, rehabilitation. That if I could, you know, be very sketchy, it seems to me that this is the thrust of both the Old Testament and the New Testament, that direction.

Q What you're saying then is that in light of the historical analysis of the death penalty with regard to your Biblical authority that a sentence of death is not commanded as punishment.

A Yes, and as I say, this is why I think this is very important to say because most of us who are one way or another adherents of the Judeo-Christian faith, do as a matter of fact, whether we are aware of it or not, operate on the basis of some sort of religious authority, which is the Bible, and many times we do make the mistake of treating the Bible something like the Korans did of the Muhammads, something already written and lowered down and there it is, whereas, for the Hebrew and for the Christian the Bible is an historical document, see, it has its own history and development and in the last analysis, where the Christian, the Old Testament is read through as it were the eyes of Christ, and that's where 'the eye for an eye, a tooth for a tooth,' is given a very different kind of meaning. It becomes transcended.

Q Are you acquainted with Raymond Franklin?

A Yes, I have met him.

Q Do you think the principles that you have expounded upon apply to the facts and circumstances of this case as you know them?

A Yes, I do.

BY MR. STAPLES: Thank you.

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CROSS EXAMINATION BY MR. CHARRON:

Q When did you meet Raymond Franklin?

A I met him yesterday.

Q Less than twenty-four hours ago?

A About that.

Q And when did you find out the facts and how do you know the facts of this case?

A Well, I've read his statement, confession, whatever you call it.

Q Have you had the benefit of any of the State's evidence at all?

A Some of it, yes.

Q Which evidence?

A Well, the evidence in terms of some of the details of what he did prior to, at least this particular event and during the course of the events that happened.

Q You haven't had the benefit of all the evidence that the Jury has had, right?

A Well, I don't know if I have all of the evidence, I don't know what they have received.

Q Photographs and statements of other witnesses.

A No.

Q And you say you've been in religion for twenty-three years, right?

A Teaching.

Q How long before that, what capacity were you in?

A Well, I was in graduate school. I did parttime teaching in a college in Minnesota while in graduate school and I served a

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small church for a period of about four years. This was all prior to coming to Georgia.

Q When was that, sir, what years?

A Well, let's see, I was the pastor of that church between 1944 to 1948; then from '48 to '52, I was teaching while also doing graduate work in philosophy.

Q Are you conscientiously opposed to the death penalty?

A Yes, I am.

Q And have you been, in fact, since World War II?

A That pushes me back to when I was rather young. I can't say that the issue, as such, I faced that early. Now, because of World War II, I had to face the issue of war but the specific issue of the death penalty was not until later.

Q Were you conscientiously opposed in the war?

A Yes.

BY MR. CHARRON: That's all I have.

BY THE COURT:

Q Dr. Otto, Hosea's wife, that was Gomer?

A Right.

DON REED, First having been duly sworn, testified under oath as follows:

DIRECT EXAMINATION BY MR. STAPLES:

Q State your name for the record.

A I'm Don Reed.

Q How are you employed, Mr. Reed?

A I'm the Publisher Emeritus of the Hunstville Item, the daily newspaper in Huntsville, Texas; also serve as a consultant

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to the paper for the Harthanks Communications and a columnist.

Q How long have you been so employed?

A Forty-one years.

Q Would you give us the benefit of your educational background, please, sir.

A Would you repeat that question, please.

Q Would you tell us about your education?

A I have a degree in history, Liberal Arts Degree from the University of Chicago. I was trained in the newspaper business by the Chicago Tribune for a period of four years before I moved back to my native State of Texas, went to work for the McAllen Daily Monitor for a short period and then for another short period for the Bay City, Texas Tribune and then accepted a position to operate the paper in Huntsville.

Q Could you give us the benefit of your employment experience after that; you've been an AP correspondent?

A Well, in Huntsville, I was named the Associated Press Correspondent and this included covering all the news that developed from the Texas Department of Corrections and at that time it was commonly known as the Texas Prison System and this also included covering executions that are performed at the Huntsville Unit of TDC.

Q Have you done any lecturing?

A On the subject? I lecture at regular intervals at least one semester for the Department of Philosophy's class of death and dying at Sam Houston State University at Huntsville. I've lectured on other campuses at Austin, the University of Texas,

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University of Texas A.& M. and other places.

Q You have made a study of the death penalty?

A Well, I have made a study of the death penalty and included our complete criminal justice system because it was tied in

Q Do you have firsthand knowledge of the ritual of execution?

A I certainly do.

Q How many executions have you seen?

A I have witnessed 189 executions covering the period of January 1938 through July 30, 1964, when the last execution was held in Texas.

Q These have been in the State of Texas?

A Right.

Q Have you appeared on any television programs?

A I've appeared on a number of television programs. I was on Television Debate, a program with the late J. Edgar Hoover in Washington, the first color news TV on NBC; I appeared on the David Frost Show, weekend television in 1973, when they debated whether or not we ought to remove the restriction against capital punishment. Some people wanted the thing back, capital punishment I've appeared on NBC's Today Show, I've appeared on NBC's Nightly News and television stations in Texas and elsewhere.

Q Have you written any articles on the subject of capital punishment?

A Yes, I have authored a book on capital punishment which was published by Press of Houston in 1973 entitled "Eye Witness." The book details my experiences as a death house reporte

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Q Do you believe that people who commit crimes should be punished?

A I certainly do.

Q Are you opposed to the death penalty?

A At this time, I am. I wasn't always that way.

Q What was it that changed your mind?

A Well, after witnessing a number of executions there at the prison in Huntsville, I came to one conclusion, that apparently there must be a better way of serving society than executing people. Going back to the beginning when I witnessed my first execution and didn't like it, I thought to myself, 'Well, this is a person that's been convicted by a jury of his peers,' and I learned later that it wasn't his peers, 'Here's a man whose case has been checked by the Texas Court of Appeals' which is an automatic thing on capital cases, and as far as I was concerned, this is the law and this is what it was.

Q Have you appeared as an expert witness on the death penalty in any cases?

A In the last several years I have, I get regular calls. In addition to appearing here, I turned down two proposed assignments that I couldn't make because of prior commitments, one in Louisiana and another one in Memphis, Tennessee. I have appeared at six or seven capital trials in Texas; appeared in several in Georgia, including the Dawson Five case and a case in LaGrange; I appeared in a case in Miami.

Q The LaGrange case was the Curfew Davis case?

A That's right, and other cases.

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Q Have your opinions been expressed in the written media, as well?

A Yes, they have.

Q Give us an example of some of your works.

A Well, Time magazine did a --I didn't make the cover, bu I did make the Press Section, and they had a story on me. The Methodist publication which at that time was called "Together," and they had a feature story, editor and publisher had a feature story on me; Texas Parade and the Associated Press several years ago sent Jules Lowell to Huntsville, he's their major feature writer and he did a big feature which was illustrated with art wor which appeared on their international tauchette. By that, I mean that goes to member papers of the Associated Press all over the world.

Q Could you give us the benefit of your experience viewing a ritual execution. Could you explain that for us, please, how it works and what happens.

A Well, you know, on the face of it, it doesn't seem like it's very much. It only takes about six minutes to execute a person in Texas at the time we did it. Its ritual actually begins the day of the execution or the day before midnight and it begins early in the morning when the Assistant Warden goes to death row and reads the death warrant to the condemned man. After that, of course, the Chaplain and his family are allowed to visit with the condemned person until 3 o'clock in the afternoon. At that time he is served his last meal. Following that ritual, he is taken out of his cell, they remove his prison clothing; he's bathed, shaved, and they shave the top of his head so there is a bald spot

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to hold the electrodes on the head They also shave his left leg, and then he is given what they term, a burial suit, that consists of a blue serge Eisenhower-type battle jacket, a khaki shirt, khaki trousers, cotton socks and scuffies. Then he's placed back in his cell and from then on, all of the visitors have left and he's with the Chaplains and this ritual goes on until about 5 minutes of 12; at that time all preparations have been made in the death chamber which adjoins death row and there's a little green door that opens into the death chamber, which is a very small chamber and about 5 minutes of 12, the Warden, using a large key, will tap on the door and it's a signal that they are ready and he's taken out of his cell and he's escorted through the little green door after he bids good-by to whoever he wants to, his cellmates on death row and there's always two guards and a Chaplain, and as they get into the death chamber, the Warden stops the procession and asks the condemned man, 'Do you have anything to say?' Some of them will make a statement, other will say, 'No, I don't have anything to say,' others will pray, some of them sing spirituals and it's really something to behold and up to that point, it's not too bad. Then the Warden will point to the chair and in a very gentlemanly fashion, he will say, 'Have a seat, please.' He doesn't mean that facetiously it's serious business with him, and usually, in most cases, the man will walk to the chair unaided. We have had some that we've had to aid to get into the chair but in most cases, they seem to be resigned to what's going to happen and he's put in the chair, he's strapped down, the electrodes are attached to his head and to his left leg and when all that has been completed, then the executioner goes into a room behind the chair. That room contains the

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generator that generates the power, the special power for the execution. The room contains also a one-way glass; the executioner can see everything in that room and you can't see him. Then within several minutes or even less than that, the first charge of electricity which is 1800 volts is applied and this causes the body to rise up several inches, even though it's strapped down; the fists become clinched, they turn purple; the veins in the neck turn purple; face turns purple, although he has a mask on his face, sometimes there's the possibility of hemorrhage and blood comes gushing from his nose. This voltage is held for about a minute and then the second charge of electricity which is a lower voltage, 400 volts, is applied and that's held for thirty seconds and then there's a third charge, a final charge, I should say, of 1400 volts is applied and by that time you can hear the death rattle and they let the current run out. The executioner comes out from behind his wall and that's an indication that it's all right to unstrap him, but before they do that, the physician, the prison physician walks up to the man, places the stethoscope on his heart and says, 'I declare this man legally dead.' He's unstrapped, he's placed in a little stretcher, he's carried out to the front of the prison into a waiting hearse.

Q How does an electrocution affect people around them?

A Well, from my experience over the years, I have noticed one thing, that no one of the staff of the Texas Department of Corrections that are designated to work at the institution ever remains very long. Suddenly, I find myself alone there at a telephone, calling the Associated Press. The only person that I've

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ever noticed that stayed around a little longer was the Chaplain, but the others head for home. As far as the inmate population, you don't hear very much about it. They know that an execution has taken place but they don't talk about it and no one else talks about it. It isn't something you just talk about.

Q How does --I assume from your experience, you have also been familiar with people who lived on death row.

A Yes, I've interviewed a good many of the people that I watched die and others who had their sentences commuted to life in prison.

Q Explain to me how living on death row affects inmates?

A Well, I had found from my own experience and I'm sure there are some exceptions, that the rule is that they are hoping that it won't happen to me, and lately, that's been very true. There's one man who was freed from death row and after the United States Supreme Court made their decision in 1972, he had twenty-one stays of execution and I would talk to him after each stay and after each execution, I don't know how many we watched walk that last mile, but he kept telling me that he didn't think he would be executed, he was hoping that something would happen to save his life and he insisted right up until the day they gave him that life sentence that he was not guilty of the crime of which he was charged and today, he's one of the top inmates in the prison system. He's taking educational courses, and he's got an associate arts degree and I was quite surprised when I walked into the prison one night and the prison Jaycees were holding a meeting and he was the president conducting everything. I thought to myself, he did a better job conducting than a lot of our people in the Rotary and Kiwanis Clubs did.

Q Have you known anybody to be rehabilitated after their sentence of death was commuted?

A I've known several personally and I know through the records I have checked, I've researched the records of the more than five hundred people that came to death row from the time that the electric chair was insituted in Texas which was February 8, 1924, until July 30, 1964, and 361 people were executed during that period. Of those who were spared from the electric chair, if my memory serves me correctly, there were about 85, I believe, who had their sentences commuted to life imprisonment, and of course, some died in prison and there were 36 or 37 who received paroles, after serving the required number of years. In Texas, you serve one-third of your accumulated time; a life sentence is calculated at 60 years; you can get 500 years but the Parole Board still calculates everything at 60 years, so that would be 20 years and if you were a State-approved trusty, and two-for-one time, 60 days for every 30 days you serve, that would make you eligible to be considered for parole in around 10 or 12 years. And of that 36 or 37 who were paroled, only 2 were returned to prison as parole violators and it's interesting to note that in each case, they were returned for violating something that had nothing to do with the crimes they had committed and in each case, the crimes that they were sent to prison for were heinous crimes and as parole violators they violated DWI --

Q That's Driving While Intoxicated?

A That's right, and those two got dried out in prison and in about a year they were back in their community again and doing

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well, and I know one man, I know personally, he was graded as the worst inmate that the prison system ever had. He was there in the old days, he had murdered three or four people and he served almost thirteen years on death row because of getting stays and one thing and another, and really, he was really mean. In my way of thinking, he was a real psychopath, but on the other hand, when he finally figured out that he ought to do something with his life, he turned it around completely and believe it or not, he was paroled and today, he is a Church of Christ minister, ordained, doing prison work for the Church of Christ and is stationed in Lubbock, Texas, and he wrote a book which traced his life as a convict and telling what can be done and he uses that as an example to work with people in jails, people in prisons and conducts seminars and does a lot of writing and preaching, also. Then I had another man who I watched him get his head shaved three times; each time they got ready to execute him, why the State came and that would last a week or two and then his hair would grow back and they'd have to shave him again and this happened over a period of two months and finally, they commuted his sentence to life in prison and his crime was robbery by firearms and murder and he became a model inmate. In fact, he became the chauffeur for what we used to have as General Manager. We don't have General Managers, we have Department of Corrections Directors now, and through the assistance of the General Manager, he was paroled and got a job with a large national firm in their Houston office. He retired last year as the purchasing agent for that company and I visit with him at regular intervals and it's interesting, the philosophy that he has about this whole thing and when I ask him what he does in his spare time, he says,

'I work with kids because I don't want them to get into the trouble that I got into,' and I said, 'How do you relate to what has happened in your life?' He said, 'It's easy. I live with the man I killed everyday.' He said, 'I'm trying to atone for something that I knew was wrong.'

Q Are you familiar with Raymond Franklin?

A Yes, I met him for the first time this morning when I talked with him in the jail here.

Q Are you familiar with the facts and circumstances of this case?

A Last night I read some of the transcript of the case and I got firsthand, quote and unquote, from the Atlanta Journal while I was waiting to change planes, I picked up the paper and there was the story by David Price of what happened in Court here Monday, I believe.

Q You also --I left with you for examination part of the police files?

A Yes.

Q The complete book that I had, you examined that?

A I examined that last night.

Q You examined other witnesses' statements?

A I did.

Q Based on your knowledge of death penalty and crimes to which it has been applied and facts and circumstances of this case, do you have any opinion as to whether or not it would be suitable punishment for this case?

A I don't --in my opinion, I don't think the death penalty would be, to my way of thinking, would be suitable punishment in

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any capital case. I'm like --I feel like that about like I do about Paul the Apostle. He was probably the worst murderer that the world has ever known and I'm opposed to that form of so-called punishment, if you can call it punishment. I think there is a better way and a better way is to try to change these people through programs of corrections and offer opportunities for them to become better people and people that can be a force for good instead of a force for evil.

BY MR. STAPLES: Thank you.

BY MR. CHARRON: No questions.

BY THE COURT: Thank you very much, Mr. Reed. You may step down. I think that the testimony goes basically to the --addresses itself to the Legislatures of various States more than to the constitutionality of the penalty itself. I adhere to my ruling.

BY MR. STAPLES: For the record, Your Honor, we respectfully except.

BY THE COURT: I don't think you need to on that.

BY MR. STAPLES: Your Honor, we have two quick matters; Mr. Charron is prepared to enter a stipulation with regards to medical records from the jail which the Sheriff has, which we intend to introduce and we also have a matter of a stipulation with regards to a tape-recorded statement.

BY THE COURT: As to the authenticity of it, I believe?

BY MR. STAPLES: Right, and I would tender both of those at this time for use this afternoon.

BY THE COURT: I will admit them and you can re-tender them without, unless you wish, the necessity of reiterating

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81 6174

RAYMOND FRANKLIN,

Petitioner

VS.

WALTER ZANT, Superintendent,

Georgia Diagnostic and Classification

Center,

Respondent

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Petitioner RAYMOND FRANKLIN, by his undersigned counsel, asks leave to file the attached petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached hereto.

Respectfully submitted,

Ronnie K. Batchelor

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

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No. 81-

RAYMOND FRANKLIN,

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VS.

WALTER ZANT, Superintendent,
Georgia Diagnostic and Classification
Center,

Respondent,

AFFIDAVIT OF COUNSEL TO SUPPORT MOTION TO PROCEED IN FORMA PAUPERIS

I, Ronnie K. Batchelor, being first duly sworn according to law, say in support of the application of Petitioner, Raymond Franklin, to proceed without being required to prepay costs or fees:

1.

I am counsel for Petitioner Franklin and I have agreed to represent him without fee or reimbursement of any kind.

2.

Petitioner Franklin is presently on death row in Jackson, Georgia under the custody of the State of Georgia.

3.

Counsel was appointed to represent Petitioner at his trial and on direct appeal. This counsel has abandoned Petitioner Franklin.

4.

I am informed and believe because of his poverty, Mr. Franklin is unable to pay costs and give secuirty for same. I have been counsel for Mr. Franklin since September, 1980, and believe him to totally indigent.

Because of the urgency in this case, there is insufficient time to obtain Petitioner's pauper's affidavit. Petitioner's affidavit will be submitted to this court as soon as practical.

Ronnie K. Batchelor

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

Sworn to and subscribed
before me this 3rd day
of February, 1982.

NOTARY PUBLIC
My Commission Expires December 7, 1985

Notary Public, Georgia, State at Large
My Commission Expires Dec. 7, 1985

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RAYMOND FRANKLIN,

Petitioner

VS.

WALTER ZANT, Superintendent,

Georgia Diagnostic and Classification

Center,

Respondent

ORDER GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS IN DISTRICT COURT

The verified Petition and exhibits of RAYMOND FRANKLIN, for a Writ of Certiorari and for leave to proceed in forma pauperis having been presented to the Court together with an Affidavit pursuant to 28 U.S.C. §1915 (1964), and it appearing from the Affidavit that Petitioner is a person authorized by §1915 to proceed in forma pauperis, it is

ORDERED that Petitioner be and hereby is granted leave to proceed in this Court without prepayment of fees or costs or security therefor.

DATED: _____, 1982.

_____
Judge, Supreme Court of the United States

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTT

STATE OF GEORGIA

RAYMOND FRANKLIN, Petitioner VS. WALTER D. ZANT, Superintendent, Georgia Diagnostic and Classification Center, Respondent	*	HABEAS CORPUS NO. 5025

MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

Petitioner moves the Court for counsel appointed by the Court and paid by the State, and for payment of investigative and litigation expenses, and shows that:

1.

Petitioner is an indigent who cannot afford payment of investigative and litigation expenses necessary to diligently pursue his petition for Writ of Habeas Corpus.

2.

Present counsel did not enter the case until after Petitioner's death sentence was affirmed by the Georgia Supreme Court and certiorari denied in the United States Supreme Court.

3.

Through present counsel, Petitioner has raised numerous substantive errors in his petition for Writ of Habeas Corpus which were not previously raised by his former attorneys, including whether the Trial Judge's charge was improper.

4.

In order to fully and fairly present his case to the court, Petitioner needs to subpoena witnesses and hire experts to testify concerning matters

in issue, but is unable todb so because he is an indigent who has been incarcerated for more than two (2) years.

5.

Petitioner requires funds to advance his state Habeas Corpus claim as follows:

(a) To pay for legal counsel.

(b) To pay an investigator to conduct investigations in regard to:

(1) Petitioner's Habeas Corpus claim that the Supreme Court of Georgia is not properly reviewing cases in which the death penalty is imposed.

(2) Petitioner's Habeas Corpus claim that his death sentence is being enacted pursuant to a practice by Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of sex and poverty in the administration of capital punishment.

(3) Petitioner's Habeas Corpus claim challenging the composition of the grand and traverse juries of Bibb County. The jury statistics for the last 6-10 years must be fully compiled to properly present the challenge.

(c) To pay subpoena and mileage costs of witnesses;

(d) To pay for expert witnesses needed to testify concerning Petitioner's challenges to the Georgia death penalty statute.

WHEREFORE, Petitioner prays that the Court:

(a) Appoint counsel to be paid by the State;

(b) Authorize payment by the State of investigative, witness-lay and expert and litigation expenses reasonably necessary for Petitioner's Habeas Corpus case to be fully and fairly heard.

s/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	
Petitioner	*	HABEAS CORPUS NO.
VS.	*	
WALTER D. ZANT, Superintendent Georgia Diagnostic and Classification Center,	*	
Respondent	*	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

In an effort to establish factually the claims alleged in his Habeas Corpus petition, petitioner has moved the Court to authorize payment for legal counsel, an investigator, subpoena and mileage costs of witnesses and expert witnesses. Motion, at 1. A number of legal precedents support this request in the circumstances of this case.

There is a Federal constitutional requirement that state post-conviction procedures be fundamentally fair and adequate for the full adjudication of Federal constitutional claims. "It is the solemn duty of ... [state] courts, no less than Federal ones, to safeguard personal liberties and consider Federal claims in accord with Federal law." Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion of Mr. Justice Powell).[1] See, e.g. McNeil v. Culver, 365 U. S. 109, 117 (1961); Wilde v. Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U. S. 143 (1960).

The ability of a prisoner to establish his Federal constitutional claims in a state post-conviction proceeding will normally depend on the evidence he can muster and this, in turn, may depend on his economic status. While the State is under no obligation to equalize exactly the opportunities of indigent and non-indigent prisoners to obtain collateral relief from

1. See, Case v. Nebraska, 381 U.S. 336, 344-345 (1965) (Concurring opinion of Mr. Justice Brennan) (Footnote omitted).

criminal convictions, a number of precedents during the last twenty years establish that the Equal Protection and Due Process Clauses of the Fourteenth Amendment do not allow a State's criminal justice system to deprive indigent defendants of basic procedural rights to obtain redress from illegal or unconstitutional convictions simply because of their indigence. The State must furnish indigent defendants with "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt vs. North Carolina, 404 U. S. 226, 227 (1971).

The fundamental fact that courts have recognized is that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U. S. 12, 19 (1056). See, Coppedge v. United States, 369 U. S. 438, 446-447 (1962). For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnent to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Thus, counsel must be appointed to represent indigent defendants at felony trials, Gideon v. Wainwright, 372 U. S. 335 (1963); Powell v. Alabama 287 U. S. 45 (1931), and misdemeanor trials, Argersigner v. Hamlin, 407 U. S. 25 (1972), and on appeal, Douglas v. California, 372 U. S. 353 (1963). A transcript for appeal may not be denied to a convicted defendant simply because of his indigence, Griffin v. Illinois, supra; Draper v. Washington, 372 U. S. 487 (1963); Williams v. City of Oklahoma City, 395 U. S. 458; Mayer v. City of Chicago, 404 U. S. 189 (1971); see also Rinaldi v. Yeager, 384 U. S. 305 (1966). An indigent defendant may not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, 360 U. S. 252 (1959); Douglas v. Green, 363 U. S. 192 (1960). A convicted defendant may not be imprisoned simply because he is unable to pay a fine, Williams v. Illinois, 360 U. S. 252 (1959; Tate v. Short, 399 U. S. 235 (1970). See also Boddie v. Connecticut, 401 U. S. 371, 375-377, 382-383 (1971). Cf. Britt v. North Carolina, supra.

The principle that the State cannot deny fundamental procedural rights in the criminal justice system simply because of economic status is not, however, limited to trials and direct appeals: "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than formality.: Johnson v. Avery, 393 U. S. 483, 386 (1969(. In Johnson, the Supreme Court of the United States invalidated the State of Tennessee's prison regulation prohibiting its inmates from assisting one another in the

filing of State or Federal post-conviction writs. The Court held that the impact of the State's regulation was to unconstitutionally "forbi[d] illiterate or poorly educated prisoners to file Habeas Corpus petitions." 393 U. S. 487, Subsequently, in Bounds v. Smith, _____ U.S. _____, 97 S. Ct. 1491, 1498 (1977), the Court held that states were constitutionally obligated "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In reliance upon Bounds v. Smith, supra, a recent Federal district court opinion held that an indigent Habeas Corpus petitioner was entitled to appointed counsel and payment by the state of investigative, witness and litigation expenses to insure a full and fair hearing. Gibson v. Jackson, ___ F. Supp. ____ (M.D. Ga., December 20, 1977). Court decisions make clear that access to state post-conviction procedures may not be limited by economic barriers which have no rational relationship to the merits of the legal claims sought to be raised. See Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214 (1958); Ross v. Schneckloth, 347 U. S. 575 (1958); McCrary v. Indiana, 364 U. S. 277 (1960); Smith v. Bennett, 365 U. S. 708 (1961); Lane v. Brown, 372 U. S. 477 (1963); Long v. District Court of Iowa, 385 U. S. 192 (1966); Gardner v. California, 393 U. S. 367 (1969). Discrimination "based on indigency alone," Lane v. Brown, supra, 372 U. S. at 485, is impermissible.

In the present case, while the State of Georgia has not denied petitioner formal access to its post-conviction remedies, by denying him funds for investigators (legal resources available to more affluent defendants), it has rendered these proceedings a "meaningless ritual," Douglas v. California, supra, 372 U. S. at 358. And this has occurred in a case where the highest standard of regularity and fairness is required, for at stake is petitioner's very life, since the State has exacted the "unique and irreversible penalty of death," Woodson v. North Carolina, 428 U. S. 280, 287 (1976) (plurality opinion) (footnote omitted). In death cases, courts must be "particularly sensitive to see that every safeguard is observed," Gregg v. Georgia, 428 U.S.

153, 187 (1976) (plurality opinion). For it "cannot fairly be denied ... that death is a punishment different from all other sanctions in kind rather than degree .... Because of that qualitative difference, there is a corresponding difference in the need for reliability that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U. S. at 303-305 (plurality opinion) (footnote omitted.).[1]

The decision in Gregg v. Georgia, 428 U. S. 153 (1976), that the Georgia capital punishment statute is constitutional on its face, does not foreclose the possibility of petitioner's prevailing on his Habeas petition, because it is a truism that a constitutional statute may be unconstitutionally applied, see, e.g., Yick Wo v. Hopkins, 118 U. S. 356, 373 (1886), and one of petitioner's contentions is that as applied the death penalty is in fact orbitrary, capricious, and discriminatory.

Petitioner's constitutional contentions present a classic instance in which the "salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable." Polk v. Grove, 305 U. S. 5, 10 (1938).[2] That principle applies "if there is a reasonable likelihood that the production of evidence will make the answer to the [constitutional] questions clearer." Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 213 (1934) (concurring opinion of Justice Stone and Justice Cardozo). Expert testimony and empirical data have played a significant part in the development of constitutional law, see, e.g., Brown v. Board of Education, 347 U. S. 483, 484 n. 11 (1954); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 460-61 (1945); San Antonio Independent School District v. Rodriquez, 411 U. S. 1, 23-25 (1973), and would illuminate the

1. In Gardner v. Florida, ____ U. S. ____, 97 S. Ct. 1197, 1204 (1977), the Court noted that: "Five members of the Court have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."

2. "Judges make constitutional law as they make other kinds of law, on the basis of facts proved and assumed. They are likely to do a better job when their assumptions rest on information rather than hunch." Karst, Legislative Facts in Constitutional Litigation, in KURLAND (ed.) THE SUPREME COURT REVIEW, 1960 at 75. See also, Bikel, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6 (1942).

constitutional claims petitioner is raising in this case. Adjudication of "important constitutional question[s] on the pleadings is not favored," Wilshire Oil Co. v. United States, 295 U. S. 100, 102 (1935), the appropriate procedure being "determination by the ... [trial] court of the facts of the case to which the challenged statute is sought to be applied," id. at 102-103. See also, Morton Salt Co. v. City of South Hutchinson, 159 F. 2d 897, 902 (CA10 1947); Cone v. Rorick, 112 F. 2d 894, 897 (CA4 1940).

The precise relief to be granted pursuant to petitioner's Motion rests within the discretion of the Court. The parties might be instructed to submit plans for the study of a representative sample of Georgia capital cases arising under the 1973 Capital Punishment Statute. The Court might order the parties to submit the names of social scientists who would submit plans for such a study. Or the Court might appoint a special auditor to make findings of fact, since Georgia law provides for the appointment of auditors "in equitable proceedings if the case shall require it," Ga Code Ann §10-101. The auditor is authorized to pass upon "questions of ... fact" arising from the contentions of the parties, and he is empowered to "subpoena and swear witnesses and compel the production of papers." Ga Code Ann §10-103. He may also hold evidentiary hearings, Ga Code Ann § 10-104, and prepare reports, Ga Code Ann §10-201, containing findings of fact, Ga Code Ann §1-203.

While petitioner's motion necessitates the expenditure of State funds, the rights of an indigent defendant are not subject to a balancing test when his life is at stake. In Mayer v. City of Chicago, 404 U. S. 189 (1971), for example, the City argued that it should not have to provide transcripts for an appeal of right to indigent prisoners sentenced to pay a fine. The Court flatly rejected this contention:

> The city suggest that ... [an indigent defendant's] interest in a transcript is out-weighed by the State's fiscal and other interest in not burdening the appellate process. This argument misconceived the principle of Griffin ... Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not

> erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

404 U. S. at 196-97. The Georgia State Bar Association has recognized that "[a] lawyer is often no better than the investigation facilities of expert witnesses as his command.[1] Since "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society," Marion V. Beto, 434 F. 2e 29, 32 (5th Cir. 1970), it should be adequate to insure that this indigent, death-sentenced inmate has a realistic opportunity to present in his state habeas corpus proceeding the Federal constitutional contentions which may save his life.

Respectfully submitted,

s/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

1. Committee of the State Bar of Georgia on Compensated Counsel, Assistance to the Indigent Person Charged with Crime, 2 GA.B.J. 197, 202 (1965).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing on the respondent in this action by placing true and correct copies thereof in the United States Mail, first class postage prepaid, addressed to respondent as follows:

Mr. Walter D. Zant
Superintendent
Gerogia Diagnostic & Classification Center
P. O. Box 3877
Jackson, Georgia 30233

and on the Attorney General by placing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

Hon. Arthur K. Bolton
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This 19th day of May, 1981.

/s/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner